

No. 96-7151

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In the Supreme Court of the United States

OCTOBER TERM, 1996

DEBRA FAYE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner was properly charged and convicted for the murder of her four-year-old stepdaughter under the Assimilative Crimes Act, 18 U.S.C. § 13, and the Louisiana child murder statute, 14 La. Rev. Stat. Ann. § 30A(5), and if not, whether the sentence was proper.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 64-92) is reported at 92 F.3d 1371. The opinion of the district court denying petitioner's pretrial motion to dismiss the indictment (J.A. 8-18) is reported at 848 F. Supp. 692.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1996. A petition for rehearing was denied on September 16, 1996. Pet. App. B; J.A. 93. The petition for a writ of certiorari was filed on December 16,

1996, and was granted on May 12, 1997, limited to a question framed by order of the Court (117 S. Ct. 1730). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Assimilative Crimes Act (ACA) provides, in pertinent part, as follows:

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. 13(a).

The federal murder statute provides as follows:

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the

death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

18 U.S.C. 1111.

The Louisiana first degree murder statute provides, in pertinent part, as follows:

A. First degree murder is the killing of a human being:

* * * * *

(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

La. Rev. Stat. Ann. § 14:30A(5).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted of first degree murder of Jadasha D. Lowery, in violation of La. Rev. Stat. Ann. § 14:30A(5), and pursuant to the Assimilative Crimes Act, 18 U.S.C. 13, 7, and 2. Petitioner was sentenced

to life imprisonment.¹ The court of appeals affirmed the conviction and sentence. J.A. 64-92.

1. Statutory Background

a. Congress exercises legislative jurisdiction over federal enclaves pursuant to Article I, § 8, Cl. 17, and Article IV, § 3, Cl. 2, of the Constitution. See *United States v. Sharpnack*, 355 U.S. 286, 288 (1958). The first Federal Crimes Act provided for the punishment of certain serious offenses, such as murder, manslaughter, maiming, and larceny, if committed "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States." Act of April 30, 1790, ch. 9, § 3, 1 Stat. 113; see also §§ 7, 13, 16, 1 Stat. 113-116. Persons committing other crimes in the federal enclaves went unpunished, however, since the States lacked jurisdiction over these areas, and the federal courts lacked common law jurisdiction. See *Williams v. United States*, 327 U.S. 711, 720-721 n.19 (1946); *United States v. Press Publishing Co.*, 219 U.S. 1, 12 (1911); *Jurisdiction over Federal Areas Within the United States, Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States*, Pt. II, at 124-126 (1957).

Congress subsequently enacted the Federal Crimes Act of March 3, 1825, ch. 65, 4 Stat. 115, which expanded the list of enumerated federal crimes. For areas subject to exclusive federal jurisdiction, Section 3 of the 1825 Act supplemented the enumerated

¹ Co-defendant James Lewis was also convicted of first degree murder and sentenced to life imprisonment. His petition for a writ of certiorari, docketed as No. 96-7726, is currently pending.

crimes by adopting as federal criminal law the criminal laws of the State within which the federal enclave was located. *Ibid.*; see *Williams*, 327 U.S. at 720-721 & n.19; *Press Publishing*, 219 U.S. at 10-13. Section 3 of the 1825 Act, which became the basis of the present Assimilative Crimes Act, provided:

* * * if any offence shall be committed in any [federal enclave], the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States having cognisance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state.

4 Stat. 115.²

Congressman (later President) James Buchanan explained the need for that provision by observing that "a great variety of actions, to which a high degree of moral guilt is attached, and which are punished as crimes at the common law, and by every State in the Union, may be committed with impunity on the high seas, and in any place where Congress has exclusive jurisdiction." *Williams*, 327 U.S. at 720-721 n.19 (quoting 40 Annals of Congress, 17th Cong., 2d Sess. 929 (1822-1823)). In acting to redress that

² The Act covered offenses committed in "any fort, dock-yard, navy-yard, arsenal, armory, or magazine, the site whereof is ceded to, and under the jurisdiction of, the United States, or on the site of any lighthouse, or other needful building belonging to the United States." 4 Stat. 115.

situation, "Congress expressly adopted the fundamental policy of conformity to local law" and "made it clear that, with the exception of the enlarged list of offenses specifically proscribed by it, the federal offenses in each enclave were to be identical with those proscribed by the State in which the enclave was situated." *Sharpnack*, 355 U.S. at 290. See also *Franklin v. United States*, 216 U.S. 559, 568 (1910).

In *United States v. Paul*, 31 U.S. (6 Pet.) 141, 142 (1832), this Court construed the 1825 Act as "limited to the laws of the several states in force at the time of its enactment." Because the ACA (so construed) did not authorize the application to federal enclaves of state laws enacted after 1825, "the Act gradually lost much of its effectiveness in maintaining current conformity with state criminal laws." *Sharpnack*, 355 U.S. at 291. Congress therefore undertook periodic reenactments of the Assimilative Crimes Act to adopt the state laws in effect at the time of each reenactment. See Act of April 5, 1866, ch. 24, § 2, 14 Stat. 13; Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717; Act of March 4, 1909, ch. 321, § 289, 35 Stat. 1145; Act of June 15, 1933, ch. 85, 48 Stat. 152; Act of June 20, 1935, ch. 284, 49 Stat. 394; Act of June 6, 1940, ch. 241, 54 Stat. 234. See generally *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 398-399 (1944) (Frankfurter, J., dissenting); *Franklin*, 216 U.S. at 570.³

³ In addition, the use of the term "offense" was abandoned when Congress codified the federal criminal laws in 1909. As amended in 1909, the ACA applied to any person "who shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which" would be "penal" under state law. 35 Stat. 1145. The House Report stated that "[a]n act which is not forbidden by law and to the commission of which no penalty is attached in no legal sense can be denominated an

In 1948, Congress amended the ACA to make the Act applicable to offenses committed in federal enclaves under the state laws in force at the time of the alleged offense. Act of June 25, 1948, ch. 1, § 13, 62 Stat. 686. The current Act thus dispenses with the requirement for further periodic reenactment of the ACA in order to stay current with changing state criminal law. In *Sharpnack*, this Court upheld the 1948 ACA against constitutional challenge, rejecting the contention that assimilation of state laws enacted after the passage of the 1948 Act represented an improper delegation of federal authority to state officials. The Court explained that "[r]ather than being a delegation by Congress of its legislative authority to the States, it is a deliberate continuing adoption by Congress for federal enclaves of such unpre-empted offenses and punishments as shall have been already put in effect by the respective States for their own government." 355 U.S. at 294.

In its current form, the ACA applies within the "special maritime and territorial jurisdiction of the United States," as defined by 18 U.S.C. 7. That area includes, *inter alia*, "[a]ny lands reserved or acquired for the use of the United States * * * for the erection of a fort, magazine, arsenal, dockyard, or other needful building." 18 U.S.C. 7(3). Under the ACA, a person who in a federal enclave "is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State

'offense.' The section has therefore been rewritten so as to correctly express what Congress intended when it enacted the section referred to." H.R. Rep. No. 2, 60th Cong., 1st Sess. Pt. I, at 25 (1908). See *Williams*, 327 U.S. at 722 & n. 24.

***, shall be guilty of a like offense and subject to a like punishment." 18 U.S.C. 13(a).

b. The federal murder statute provides that "[m]urder is the unlawful killing of a human being with malice aforethought." 18 U.S.C. 1111(a). The statute identifies several categories of first degree murder and provides that "[a]ny other murder is murder in the second degree." *Ibid.* Like the Assimilative Crimes Act, the federal murder statute applies "[w]ithin the special maritime and territorial jurisdiction of the United States." 18 U.S.C. 1111(b). Persons convicted of first degree murder "shall be punished by death or by imprisonment for life." *Ibid.* Persons convicted of second degree murder "shall be imprisoned for any term of years or for life." *Ibid.*

c. Louisiana law establishes a variety of categories of first degree murder. The applicable statute provides, *inter alia*, that a homicide is first degree murder "[w]hen the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve years." La. Rev. Stat. Ann. § 14:30A(5). That provision was added to the Louisiana criminal code in 1985. See 1985 La. Acts, No. 515, § 1. The Louisiana statute provides for a mandatory sentence of life imprisonment if the government does not seek the death penalty. La. Rev. Stat. Ann. § 14:30C.

2. *The present proceeding*

a. Jadasha Lowery was the four-year-old daughter of James Lewis. Petitioner was her stepmother. Her death occurred in the family's home at Fort Polk, a United States military reservation, where James Lewis was stationed with the U.S. Army. J.A. 65. It is undisputed that the place at which Jadasha's death

occurred is an area within the exclusive jurisdiction of the United States. See J.A. 5-6.

Jadasha was killed at the hands of petitioner and James Lewis on December 20, 1993, as the result of repeated and severe beatings. The forensic pathologist who examined Jadasha counted more than 200 injuries on her body. Jadasha received most of those injuries within 24 hours of her death, although raw sores, lacerations, and callouses on her body evidenced chronic and repetitive injuries. J.A. 65, 83-85.

Petitioner and James Lewis admitted that they had beaten Jadasha numerous times within the 24-hour period before her death. James Lewis shook the little girl and beat her with his hand or a fly swatter. Petitioner beat Jadasha with a fly swatter, hit her across the face with a coat hanger, and also used switches to whip the child. Because the three spent the day of Jadasha's death together, petitioner and James Lewis were each aware of the beatings administered by the other. Indeed, once during the day, the little girl ran into her room following a beating by James Lewis—only to have petitioner summon her again for another round of beatings by her father. J.A. 83.

Investigators at the crime scene found blood throughout the house. Blood was present on the floor of the living room, on the floor in Jadasha's room, on the sofa, window curtain, closet doors in the hallway, master bedroom closet, on the walls, on clothing, on blankets. Blood was found on pieces of a curtain rod found crumpled in the Lewises' garbage can. One blood spot on the wall looked like a child's smeared hand print. J.A. 84.

The pathologist testified that Jadasha had died of a cerebral edema—a swelling of the brain that ulti-

mately causes respiratory functions to cease—caused by a blow to the head. He conservatively counted nine head injuries, any one of which was sufficient to cause death. He testified that such a blow was the equivalent of dropping a child on her head from more than three feet onto an uncarpeted floor. J.A. 65, 84-85. Jadasha also suffered massive hemorrhaging, losing one- to two-thirds of her entire blood volume from her circulatory system, which was redirected into the tissues underlying her injuries. The pathologist testified that the hemorrhaging could have eventually caused the girl's death if the head injuries had not killed her first. J.A. 85.

Neighbors and friends described a history of child abuse by petitioner and James Lewis. One had observed injuries on Jadasha on several occasions, including a large black eye and burst lip. Another testified that petitioner had withheld food from Jadasha for three days and had bathed the little girl in bleach. Others recalled observing signs of injury and abuse, including a burn on Jadasha's ear caused by hot liquid. A few remembered hearing petitioner state that "if she didn't stop whipping Jadasha she would hurt her or kill her," and that "she was going to let James whip [Jadasha because] [s]he wasn't going to go to jail for killing that child." J.A. 85-86.

b. The indictment in this case charged petitioner and James Lewis with first degree murder under Louisiana law pursuant to the ACA. See J.A. 3-4.⁴

⁴ The indictment charged that petitioner and her co-defendant "did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14, Louisiana Revised Statutes Annotated, Section

Before trial, petitioner filed a motion to dismiss the indictment. See J.A. 5-7. She argued that the federal murder statute, 18 U.S.C. 1111, provides for the specific crime of first degree murder, and that the assimilation of the Louisiana murder statute under the ACA was therefore improper. See J.A. 6-7.

The district court denied the motion, holding that petitioner was subject to prosecution under the Louisiana statute. J.A. 8-18. The court acknowledged that "the acts with which [petitioner is] charged could be punishable under the federal murder statute." J.A. 15. It concluded, however, that petitioner was

being prosecuted in this case under a state statute designed to punish specific conduct of a different character than that proscribed in the federal murder statute. The state statute is specifically designed to provide a deterrent to child abuse, a subject which is not addressed by federal law.

Ibid. The court held on that basis that "the use of the ACA is proper and [petitioner's] motion to dismiss will be denied." J.A. 18.

c. Petitioner and her co-defendant were tried before a jury on the assimilated state charge of first degree murder under La. Rev. Stat. Ann. § 14:30A(5). The district court instructed the jury that it could convict petitioner on that charge only if it found beyond a reasonable doubt that (1) petitioner "killed Jadasha Lowery," (2) petitioner "acted with specific intent to kill or inflict great bodily harm," and (3) "[t]he victim was under twelve years of age." J.A. 31.

[30A(5)], * * * in violation of Title 18, United States Code, Sections 7, 13 and 2." J.A. 3-4.

The jury found petitioner guilty of that offense. J.A. 37.

Following her conviction, petitioner was sentenced to life imprisonment under the federal Sentencing Guidelines. See J.A. 48. She was assigned a base offense level of 43, pursuant to the Guideline for first degree murder, § 2A1.1. She was given two additional points under Guidelines § 3A1.1 (vulnerable victim), for a final offense level of 45. See J.A. 48-51. She was placed in Criminal History Category I. J.A. 48. The resulting Guidelines sentence was life imprisonment. *Ibid.* The district court sentenced petitioner to life imprisonment. J.A. 58.

d. The court of appeals affirmed petitioner's conviction and sentence. J.A. 64-92.

The court of appeals first held that petitioner should have been charged under the federal murder statute rather than the Louisiana murder statute and the Assimilative Crimes Act. J.A. 66-75. The court asserted that the ACA "fills in gaps existing in federal statutes regarding criminal law," but that "where Congress has enacted legislation criminalizing conduct on the enclaves, the federal statutes preempt the state laws regarding those crimes." J.A. 67. In the view of the court of appeals, no "gap" in federal law existed because the conduct at issue was proscribed by 18 U.S.C. 1111. J.A. 71. The court concluded that "the federal murder statute preempts the Louisiana first degree murder statute because the killing of a human being is punishable under the federal statute and because the nature of the crime 'murder of a child' does not differ substantially from the nature and theory of murder in general." J.A. 75.

The court held, however, that the government's reliance on the Assimilative Crimes Act did not re-

quire reversal of petitioner's conviction. The court observed that "malice aforethought" under 18 U.S.C. 1111(a) may be established by, *inter alia*, proof of "intent to do serious bodily injury." J.A. 78 n.11. The court then explained:

The basic elements are the same for second degree murder under 18 U.S.C. § 1111(a) and first degree murder under La. Rev. Stat. § 14:30A(5). Both statutes require proof of specific intent and the killing of a human being. Regarding intent, 18 U.S.C. § 1111 requires proof of "specific intent to inflict serious bodily injury," and La. Rev. Stat. § 14:30A(5) requires proof of "specific intent to inflict great bodily harm." * * * Though labeled somewhat differently, "intent to inflict serious bodily injury" and "intent to inflict great bodily harm" represent parallel intents for purposes of evaluating these murder statutes.

J.A. 77-78 (footnote omitted). Based on the statutory elements of the state and federal crimes, and the instructions given to the jury at petitioner's trial, the court of appeals concluded that the elements of second degree murder under 18 U.S.C. 1111(a) had been proved by the government and found by the jury. J.A. 78-80.

The court of appeals also concluded that a remand for resentencing was unnecessary. The court stated that "[r]esentencing is only required where the district court has imposed a sentence that exceeded the maximum sentence that the defendant would have received if sentenced under the applicable federal statute." J.A. 80. The court observed that petitioner "did not receive a sentence exceeding the maximum sentence allowed under the federal murder statute,"

because federal law provides that persons convicted of second degree murder may be imprisoned "for any term of years or for life." *Ibid.* (quoting 18 U.S.C. 1111(b)). The court of appeals concluded on that basis that it "need [not] remand for resentencing." J.A. 80; see Pet. App. 17.⁵

SUMMARY OF ARGUMENT

1. Petitioner was properly charged and convicted under the Assimilative Crimes Act and the Louisiana child murder statute. The fact that petitioner's conduct could have been prosecuted under the federal murder statute does not make use of the ACA improper. Rather, the crucial question in this case is whether Congress has focused directly on the appropriate sanction for the specific class of conduct—murder of a child under 12—that constitutes the state offense.

That approach is consistent with this Court's decisions and ensures that Louisiana law will apply throughout the State unless it is in conflict with a considered congressional policy judgment regarding

⁵ The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence and to the admission into evidence of certain photographs and of petitioner's own statements to investigators. J.A. 81-91. In addition, the court rejected petitioner's contention that Battered Women's Syndrome "diminished her capacity to develop specific intent to kill or inflict great bodily harm on Jadasha." J.A. 91. The court explained that the record contained sufficient evidence that petitioner acted with the requisite intent; that the jury "heard and evaluated the testimony regarding Battered Women's Syndrome" and "chose not to believe that the Syndrome affected her ability to develop the intent necessary to commit murder"; and that there was "no basis in the record to disturb the jury's credibility choices." *Ibid.*

the proper administration of federal enclaves. Where Congress has directly addressed the precise acts that constitute the state offense, its judgment as to the appropriate sanction for that conduct must take precedence over the conflicting judgment of the State. But where Congress has not addressed the relevant conduct at the same level of specificity as the State, prosecution under the ACA should not be foreclosed by the existence of a more general federal statute that subsumes the offense in question.

When it enacted the federal murder statute in 1909, Congress simply codified what was at that time the prevailing definition of murder in the large majority of States. Congress did not consider and reject an existing state practice of treating the murder of children as a particularly serious crime. Since that time, Congress has not addressed the subject of child murder in any precise, direct, or focused manner, either by enacting a child murder provision or by making a considered determination that the age of a murder victim is irrelevant to the seriousness of the offense. The Louisiana child murder statute does not conflict with any federal policy reflected in 18 U.S.C. 1111, and petitioner was properly convicted of the assimilated state offense.

2. If this Court holds that the assimilation of Louisiana law was improper, the case should be remanded for resentencing for the federal offense of second degree murder. In finding petitioner guilty on the Louisiana child murder charge, the jury necessarily found all of the elements of second degree murder under 18 U.S.C. 1111(a). Entry of a judgment of conviction for that offense would therefore be the appropriate remedy if this Court holds that the existence of the federal murder statute precluded reliance on the

ACA. The court of appeals erred, however, in concluding that resentencing was unnecessary simply because the terms of imprisonment imposed by the district court fell within the statutory maximum sentence for second degree murder under federal law. Rather, petitioner should be resentenced under the Sentencing Guidelines if this Court vacates her conviction on the assimilated state offense and orders entry of a judgment of conviction for second degree murder under 18 U.S.C. 1111(a).

ARGUMENT

I. PETITIONER WAS PROPERLY CHARGED AND CONVICTED UNDER THE ASSIMILATIVE CRIMES ACT AND THE LOUISIANA CHILD MURDER STATUTE

Conduct occurring on federal enclaves is subject to two distinct bodies of criminal law. First, a number of substantive criminal statutes define and punish offenses committed "within the special maritime and territorial jurisdiction of the United States." See, e.g., 18 U.S.C. 81 (arson); 18 U.S.C. 113 (assault); 18 U.S.C. 1111 (murder); 18 U.S.C. 1201(a)(2) (kidnapping). Second, Congress has enacted the Assimilative Crimes Act, the purpose and effect of which is "to incorporate the criminal laws of the several States * * * into the statute and to make such criminal laws to the extent of such incorporation laws of the United States." *United States v. Press Publishing Co.*, 219 U.S. 1, 8 (1911); see also *id.* at 10 (under the ACA, assimilated state-law crime is "punished as an offense against the United States"). With predecessors dating from 1825, the ACA reflects a longstanding federal policy that acts occurring on federal enclaves should ordinarily be governed by the same legal rules,

and subject to the same punishments, as comparable acts occurring in other areas of the State in which the enclave is located. See *United States v. Sharpnack*, 355 U.S. 286, 293 (1958) ("The basic legislative decision made by Congress is its decision to conform the laws in the enclaves to the local laws as to all offenses not punishable by any enactment of Congress.").

At issue in this case is the manner in which those two bodies of federal criminal law are appropriately harmonized. The ACA authorizes federal prosecution where an "act or omission" on a federal enclave, "although not made punishable by any enactment of Congress," would have violated the law of the State in which the enclave is located. 18 U.S.C. 13(a). In our view, a state offense is "made punishable" by an Act of Congress for purposes of the ACA only when a substantive federal statute focuses directly on the specific class of conduct that constitutes the state offense.⁶

⁶ The statute's current wording does not clearly indicate that it is a prerequisite for conviction under the ACA that an act is not "made punishable" under another federal statute. See 18 U.S.C. 13(a) (ACA applies to person who "is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State"). This Court has stated, however, that the Act in its current form "expressly limits the assimilation to acts or omissions committed within a federal enclave and 'not made punishable by any enactment of Congress.'" *Sharpnack*, 355 U.S. at 292. And earlier versions of the ACA have unambiguously provided that assimilation of a state-law offense is improper if that offense has been defined and prohibited by an Act of Congress. See, e.g., Act of March 3, 1825, ch. 65, § 3, 4 Stat. 115 (authorizing assimilation of any state-law offense "the punishment of which

Louisiana has made the murder of a child, with specific intent either to kill or to cause serious bodily injury, a separate and distinct crime, punishable as first degree murder. La. Rev. Stat. Ann. § 14:30A(5). The passage of the Louisiana child murder statute reflects the State's view that "[c]hildren * * * are in the category of persons needing special protection." *Louisiana v. Weiland*, 505 So.2d 702, 709 & n.31 (La. 1987). Congress has enacted no law addressed specifically to the murder of children. Nor does the history of the federal murder statute reveal any deliberate congressional rejection of the judgment, embodied in La. Rev. Stat. Ann. § 14:30A(5), that the murder of children is a particularly serious offense. Because the Louisiana child murder statute is not displaced by any conflicting federal law that focuses directly on that conduct, the ACA authorizes a federal prosecution that assimilates the Louisiana child murder law.

A. The Phrase "Act Or Omission" In The ACA Refers To The State Law Offense That Supports An ACA Charge

1. This Court's most thorough discussion of the ACA is contained in *Williams v. United States*, 327 U.S. 711 (1946). The defendant in that case was charged with having sexual intercourse with a female between the ages of 16 and 18 in Indian country. 327

offence is not specifically provided for by any law of the United States"); Act of June 6, 1940, ch. 241, 54 Stat. 234 (authorizing ACA prosecution of any person who "shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which * * * would be penal" under state law). The Reviser's Notes accompanying the 1948 revision stated that no substantive change was intended. See 18 U.S.C. 13 note ("Minor changes were made in phraseology.").

U.S. at 713. He was convicted of statutory rape, pursuant to the ACA, under an Arizona statute that set the age of consent at 18. See *id.* at 713, 715-716. At the time of the prosecution and conviction, Acts of Congress applicable to federal enclaves defined the separate crimes of rape, assault with intent to commit rape, adultery, and fornication. *Id.* at 713-714 & nn. 4-5, 7-8. The Arizona statute defined the offense of rape to include "an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, * * * [w]here the female is under the age of eighteen [18] years." 327 U.S. at 716 n.11. Because the Arizona statute applied only if the victim was "not the wife of the perpetrator," any act violative of the state law would have constituted either adultery or fornication under the federal statutes then in effect. See *id.* at 714 nn. 7 & 8. Federal law also defined the offense of having carnal knowledge of a girl (*i.e.*, statutory rape), but the statute applied only if the girl was less than 16 years old. *Id.* at 714 & n.6. This Court held that the Arizona statutory rape provision, with its higher age of consent, could not be assimilated under the ACA, see *id.* at 717-725.

In explaining its conclusion that assimilation of the state law was improper, the Court stated:

the [ACA] does not make the Arizona statute applicable in the present case because (1) the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery and (2) the offense known to Arizona as that of "statutory rape" has been defined and prohibited by the Federal Criminal Code, and is not to be redefined and enlarged by application to it of the [ACA].

327 U.S. at 717 (footnotes omitted). "The fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the State," the Court stated, "does not mean that the Congressional definition must give way to the State definition," *id.* at 717-718, because "a conflicting State definition does not enlarge the scope of the offense defined by Congress," *id.* at 718. In the area of sexual offenses, the Court explained, Congress had "covered the field with uniform legislation affecting areas within the jurisdiction of Congress." *Id.* at 724. And in drafting the carnal knowledge statute in particular, Congress had given "special attention to the age of consent." *Ibid.* The Court therefore held that the Arizona statutory rape law could not be applied to the federal enclave under the ACA. *Id.* at 725.

The Court in *Williams* did not rest its holding simply on the fact that the Arizona statutory rape law covered conduct that would be subject to prosecution under federal adultery or fornication statutes. Rather, after noting that Congress had made penal the "precise acts" on which conviction depended, 327 U.S. at 717, the court went on to examine at length the specific relationship between state and federal law, *id.* at 717-725. By its analysis, the Court thus rejected any view that acts that constitute a state crime are "made punishable by any enactment of Congress" for purposes of the ACA simply because it might be possible to prosecute the general conduct at issue under some federal criminal law.

2. The approach taken in *Williams* is consistent with the ACA's history. Before the codification of the federal criminal laws in 1909, the ACA provided that

when any offense is committed in any place [under the exclusive jurisdiction of the United States], the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall * * * be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State * * *.

Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717; see also *Williams v. United States*, 327 U.S. at 722 n.23 (quoting Rev. Stat. § 5391 (1878)). As codified in 1909, the Act applied to any person "who shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which * * * would be penal" under state law. Act of March 4, 1909, ch. 321, § 289, 35 Stat. 1145. The congressional report accompanying the 1909 codification did not suggest that substitution of the phrase "act or thing" for the word "offense" was intended to alter the scope of the statute's coverage. Rather, the report stated that "[a]n act which is not forbidden by law and to the commission of which no penalty is attached in no legal sense can be denominated an 'offense.' The section has therefore been rewritten so as to correctly express what Congress intended when it enacted the section referred to." H.R. Rep. No. 2, 60th Cong., 1st Sess. Pt. I, at 25 (1908) (quoted in *Williams*, 327 U.S. at 722-723 n.24).

The Court in *Williams* acknowledged that use of the phrase "act or thing" in the 1909 codification may have led courts or litigants "to interpret it in a specific sense as referring to individual acts of the parties rather than in a generic sense referring to

acts of a general type or kind." 327 U.S. at 722. The Court observed, however, that "the expressed purpose of the Committee [was] to continue, rather than to change, [the Act's] original meaning." *Id.* at 723. Thus, the ACA in its current form—like the pre-1909 version—should be read to apply when the state law offense that forms the basis for a federal charge under the ACA has not separately been "made punishable" as a federal crime.

3. To treat the ACA as inapplicable whenever the defendant's primary conduct happens to violate some federal law would produce incongruous results and would undermine the effectuation of the statutory purposes. Under that approach, for example, petitioner's conviction on the assimilated state charge in this case would have been improper even if there were no federal murder statute, since her conduct would have constituted assault under federal law. See 18 U.S.C. 113. More generally, there is no sound reason that Congress would have intended to preclude the adoption of a state criminal provision for crimes on enclaves simply because the defendant's conduct fortuitously violates a federal law directed at a different evil. That approach would (albeit in somewhat less stark form) reintroduce the problem that precipitated the initial passage of the ACA—*i.e.*, the danger that an individual who commits what would otherwise be a state law offense on a federal enclave might escape appropriate punishment because state officials lack jurisdiction and Congress has not focused its attention on the offense in question. See pages 4-5, *supra*.

4. The courts of appeals have repeatedly sustained convictions for assimilated state crimes under the ACA, even where the defendant's conduct would also

have been subject to prosecution under a federal criminal statute.⁷ The decisions most closely on point have recognized, in particular, that state laws prohibiting the abuse of children may properly be applied in federal enclaves under the Assimilative Crimes Act, even where the conduct at issue is also violative of a more general federal law.⁸ Indeed, petitioner concedes that "the government could have prosecuted the defendant under the federal second degree murder statute and assimilated the state

⁷ See, *e.g.*, *United States v. Sasnett*, 925 F.2d 392, 396 (11th Cir. 1991) (offense of causing death while driving under the influence of alcohol was properly prosecuted under state law through the ACA even though defendant's conduct was also covered by federal involuntary manslaughter statute; state law was "designed to punish specific conduct which is not specifically addressed by federal law"); *United States v. Kaufman*, 862 F.2d 236, 237-238 (9th Cir. 1988) (per curiam) (ACA prosecution was brought under an assimilated Oregon law that prohibited pointing a loaded or unloaded firearm at another; the court held that the ACA charge was proper even though defendant might have been prosecuted under federal assault statute); *United States v. Vaughan*, 682 F.2d 290, 293 (2d Cir. 1982) (ACA prosecution properly brought for second degree burglary, even though defendant could have been prosecuted under federal assault and larceny statutes); *Fields v. United States*, 435 F.2d 205, 207-208 (2d Cir.) (assimilation of state malicious shooting statute was proper even though acts committed were criminal under federal assault statute), cert. denied, 403 U.S. 907 (1971).

⁸ See *United States v. Brown*, 608 F.2d 551, 553-554 (5th Cir. 1979) (assimilation under ACA of Texas child abuse statute was proper even though conduct was also covered by federal assault statute); *United States v. Fesler*, 781 F.2d 384, 390-391 (5th Cir.) (affirming conviction under assimilated Texas child abuse statute for conduct covered by federal involuntary manslaughter statute), cert. denied, 476 U.S. 1118 (1986).

cruelty to juveniles statute as a separate charge had it so desired," Pet. Br. 18, and thereby acknowledges that a state law offense may be prosecuted under the ACA even where the general conduct also violates a federal statute.

B. The Offense Of Child Murder Under Louisiana Law Is Not "Made Punishable" By The Federal Murder Statute

The crucial question in this case is whether child murder, as defined by Louisiana law, is an offense "made punishable by any enactment of Congress." 18 U.S.C. 13(a). The indictment in this case alleged that petitioner "did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14, Louisiana Revised Statutes Annotated, Section [30A(5)]." J.A. 3. The district court instructed the jury that the elements of the charged offense were that (1) petitioner "killed Jadasha Lowery," (2) petitioner "acted with specific intent to kill or inflict great bodily harm," and (3) "[t]he victim was under twelve years of age." J.A. 31. Thus, the "offense" with which petitioner was charged and convicted was child murder—a subcategory of first degree murder as defined by Louisiana law.

Viewed under the correct standard, that assimilated state offense would be "made punishable" by an Act of Congress only if Congress has focused directly in federal criminal law on the appropriate sanction for the specific class of conduct—murder of a child under 12—that constitutes the state offense. That approach is consistent with this Court's decisions and furthers the purposes of the ACA by ensuring that Louisiana criminal law will be enforceable throughout the State

except when it conflicts with a considered congressional policy judgment regarding the proper administration of federal enclaves. In this case, no such conflict exists: although Congress has addressed the general subject of murder in federal enclaves, it has not directed its attention to the murder of children.

1. As this Court has recognized, the Assimilative Crimes Act must be construed in light of Congress's intent to minimize disparities between the criminal laws applicable to federal enclaves and those that govern the surrounding areas. Thus, the Court has observed that

Congress, in adopting [the ACA], sedulously considered the two-fold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the States on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation.

United States v. Press Publishing Co., 219 U.S. 1, 9 (1911). With the ACA, this Court has recognized, "Congress has * * * provided that within each federal enclave, to the extent that offenses are not preempted by congressional enactments, there shall be complete current conformity with the criminal laws of the respective States in which the enclaves are situated." *United States v. Sharpnack*, 355 U.S. 286, 293 (1958); see also *id.* at 294 (ACA "is a practical accommodation of the mechanics of the legislative functions of State and Nation in the field of police power where it is especially appropriate to make the

federal regulation of local conduct conform to that already established by the State"). "The basic legislative decision made by Congress is its decision to conform the laws in the enclaves to the local laws as to all offenses not punishable by any enactment of Congress." *Id.* at 296.

In view of the ACA's policy of conformity to state criminal law on federal enclaves, the applicability of the Act should give way only when the state law sought to be assimilated conflicts directly with federal policy as reflected in substantive criminal statutes. Where Congress has directly addressed the specific class of conduct that constitutes the state offense, assimilation of a state criminal law pursuant to the ACA is either superfluous (if Congress has defined and punished the offense in precisely the same manner as the State) or inconsistent with federal policy. But where Congress has not addressed the relevant conduct at the same level of specificity as the State, no such conflict exists. Assimilation of the state offense should not be precluded by the existence of a more general federal statute that subsumes the offense in question.

The courts of appeals have often phrased the test as whether the "precise act" proscribed by state law is also the subject of a federal prohibition. See, e.g., *United States v. Brown*, 608 F.2d 551, 554 (5th Cir. 1979) ("Although the acts with which the defendant was charged could be punishable under the federal assault statute, the 'precise act' of injury to a child is not proscribed by federal law."); *United States v. Minger*, 976 F.2d 185, 189 (4th Cir. 1992); *United States v. Sasnett*, 925 F.2d 392, 396 (11th Cir. 1991); *United States v. Kaufman*, 862 F.2d 236, 237-238 (9th Cir. 1988); *Fields v. United States*, 438 F.2d 205, 208

(2d Cir.), cert. denied, 403 U.S. 907 (1971). The "precise act" test, as developed in the lower courts, focuses on whether Congress has spoken directly to the specific class of conduct that constitutes the state offense.⁹

Properly understood, the precise act test is a means of determining whether the state law sought to be assimilated conflicts with any clearly articulated congressional policy choice. Where a substantive federal criminal statute directly addresses the "precise act" that constitutes the state offense, and prescribes a different sanction than does state law, use of the ACA would have the practical effect of permitting the State's policy judgment to supersede that of Congress. Under those circumstances, Congress's determination regarding the appropriate administration of federal enclaves must override the desire for uniform application of criminal laws throughout a State. Where Congress has addressed the relevant conduct only at a higher level of generality, however, there is no precisely focused federal policy judgment with which the state law can be said to conflict. Under those circumstances, assimilation of state law furthers the purposes of the ACA by ensuring that federal legislation "interfere[s] as little as might be with the authority of the States" regarding the definition and punishment of crimes committed within their borders. *Press Publishing*, 219 U.S. at 9.

⁹ The phrase "precise act" bears a different meaning in this context than in *Williams*, since the Court in *Williams* used that phrase in noting that the defendant's particular conduct was covered by federal law; the Court did not define the "precise act" by reference to state law. See 327 U.S. at 717 (noting that "the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery").

That conclusion is consistent with the approach taken in *Williams*. The crux of the Court's analysis was its determination that the state and federal statutes contained "conflicting" definitions of the same offense. 327 U.S. at 718. In reaching that conclusion, the Court attached significance to the fact that Congress in enacting the carnal knowledge statute "gave special attention to the age of consent," and adopted a standard inconsistent with that adopted by Arizona. *Id.* at 724; see also *id.* at 725 n.29 (noting Congress's awareness that the age of consent in the federal law was lower than that employed by some States).¹⁰

¹⁰ As the *Williams* Court noted, the government did not defend the court of appeals' judgment affirming *Williams*' conviction. See 327 U.S. at 719. In its brief to this Court in *Williams*, the government stated that assimilation of the Arizona offense would have been appropriate if Congress, in enacting the federal carnal knowledge statute, had intended only to "set the age of sixteen as the minimum, but not the maximum, age of consent for all areas of federal jurisdiction." Gov't Br. 19 (O.T. 1945, No. 123). To construe the carnal knowledge statute in that fashion, the government acknowledged, would "obviate[] the anomaly whereby an act committed in the state of Arizona is criminal or innocent depending upon whether it took place on one side of the boundary line of the Indian Reservation or the other," and it would "minimize[] the area of possible conflict between the policies of the federal and the state governments." *Id.* at 19-20. The government concluded, however, that

[i]n respect of the carnal knowledge statute, we know that Congress gave careful consideration to the problem of fixing an age of consent and that it recognized that the age which it fixed differed from the age adopted by some of the states. It is evident that by fixing the age at sixteen Congress not only provided that girls under sixteen were incapable of consenting to the proscribed acts, but inferentially Congress regarded girls sixteen or

Williams thus establishes that the general applicability of the ACA yields when Congress has made a conflicting policy choice on the definition of the precise conduct that constitutes the crime. See also *United States v. Sharpnack*, 355 U.S. at 296 & n.9 (noting that the ACA broadly adopts local law "because the laws are already in force throughout the state in which the enclave is located," but declining to "pass upon the effect of the [ACA] where an assimilated state law conflicts with a specific federal criminal statute. Cf. *Williams v. United States*.").

2. Thus, the dispositive issue in this case is whether the provisions of 18 U.S.C. 1111(a) reflect a considered congressional determination that the age of a murder victim has no bearing on the seriousness of the offense, so as to create a conflict with Louisiana law. The answer to that question is no. The history of the federal murder statute does not suggest that Congress considered and rejected the view that murder of a youthful victim is more reprehensible than murder of an adult. Rather, Congress simply codified what was at that time the prevailing definition of murder as reflected in the large majority of state criminal codes. Because Congress has not addressed the subject of child murder in any direct or focused manner—either by enacting a federal child murder provision, or by making a considered deter-

over as being capable of intelligently consenting to the acts in question.

Gov't Br. 20 (O.T. 1945, No. 123). Thus, the government's conclusion that the federal carnal knowledge statute "conflict[ed] with local policy" (*id.* at 21), was based on the fact that Congress had deliberately chosen an age of consent at variance with the laws of some States.

mination that the age of a murder victim should not be relevant in assessing the severity of the crime—the offense of which petitioner was convicted is not “made punishable by any enactment of Congress.” 18 U.S.C. 13(a).¹¹

The federal murder statute was first codified in 1909 as part of a general revision and codification of federal statutes. See H.R. Rep. No. 2, 60th Cong., 1st Sess. Pt. I, at 12 (1908). Before that time, there was no federal statutory definition of the crimes of murder or manslaughter. Rather, Revised Statutes § 5339 (1878) simply provided that whoever “[w]ithin any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States * * * maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall

¹¹ Both *Williams* and this case involved general federal statutes—here, Section 1111(a); there, the federal adultery law—that encompassed the defendant’s conduct. In each case, a State had determined that conduct falling within the general federal prohibition was particularly blameworthy if the victim was especially young. (As noted above, see page 19, *supra*, any act violative of the Arizona statutory rape law at issue in *Williams* would also have violated the federal adultery or fornication law.) The crucial difference between the cases is that in *Williams*, Congress had directly addressed the question whether (and under what circumstances) the youth of the victim warranted an additional criminal sanction, and had resolved that question in a manner inconsistent with the judgment of the State. As we explain in text, Congress has not similarly focused its attention on the question whether murder of a child is properly treated as a particularly serious crime.

suffer death.”¹² In the 1909 codification of the federal criminal laws, Congress for the first time defined murder:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

Act of March 4, 1909, ch. 321, § 273, 35 Stat. 1143.

The special commission appointed in 1897 to revise and codify the federal criminal and penal laws explained that virtually all the States had statutes defining homicide with malice and premeditation as murder in the first degree; homicide with malice, but without premeditation, as murder in the second degree; and homicide without malice or premeditation as manslaughter.¹³ The Commission stated that

¹² Section 5339 had its origin in the first Federal Crimes Act, which provided: “[I]f any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death.” Act of April 30, 1790, ch. 9, § 3, 1 Stat. 113; see *United States v. Kaiser*, 545 F.2d 467, 478 (5th Cir. 1977) (Ainsworth, J., dissenting).

¹³ The States’ demarcation of murder into first and second degree reflected the States’ desire to ameliorate the harsh common law rule imposing a mandatory death sentence on all

"[t]hese lines of demarcation have been observed in the sections which we here submit." 1 *Final Report of the Commission to Revise and Codify the Laws of the United States* 130 (1908). The House Report likewise explained that the definition of murder then adopted was "similar in terms to the statutes defining murder in a large majority of the States." H.R. Rep. No. 2, *supra*, at 24.

Thus, in codifying and defining the federal crime of murder, Congress simply adopted the definition then prevailing in the great majority of the States. Section 1111(a) continues substantially to incorporate the definition of murder that prevailed in 1909.¹⁴ Congress was not (and did not perceive itself to be) forg-

convicted murderers. See *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976); *Gregg v. Georgia*, 428 U.S. 153, 176-177 (1976); *McGautha v. California*, 402 U.S. 183, 198 (1971). Pennsylvania had led the way with its 1794 abolishment of capital punishment except for "murder of the first degree," which was defined to include all "willful, deliberate and premeditated" killings. The other States gradually followed suit. *McGautha*, 402 U.S. at 198; *Woodson*, 428 U.S. at 290; *Davis v. People of Territory of Utah*, 151 U.S. 262, 330 (1894).

¹⁴ The definition of murder contained in the federal criminal code has remained largely unchanged since its enactment in 1909. As part of the Comprehensive Crime Control Act of 1984, Congress amended Section 1111(a)'s definition of first degree murder by adding to the enumerated four felony murder offenses the offenses of escape, murder, kidnaping, treason, espionage, and sabotage. Act of October 12, 1984, Pub. L. No. 98-473, Title II, § 1004, 98 Stat. 2138. In 1986, as part of the Criminal Law and Procedure Technical Amendments Act of 1986, Congress struck out "rape" and in its place inserted "aggravated sexual abuse or sexual abuse." Act of November 14, 1986, Pub. L. No. 99-654, § 87(c)(4), 100 Stat. 3623. The same change was also effected by the Sexual Abuse Act of 1986, Pub. L. No. 99-654, 100 Stat. 3660.

ing new law. Congress did not, in particular, consider and reject an existing state practice of treating the murder of children as a particularly serious crime.

The various state criminal codes reflect a diverse array of developing legislative judgments regarding the categories of murder that should be treated as particularly culpable. If the federal murder statute is regarded as "occupying the field," those state legislative judgments will have no force or effect with respect to conduct occurring on federal enclaves. That result would undermine the ACA's purpose of "maintaining current conformity with state criminal laws," *Sharpnack*, 355 U.S. at 291, in locations subject to exclusive federal jurisdiction. That result should not be reached here. Because the Louisiana child murder statute does not conflict with any federal policy reflected in 18 U.S.C. 1111, petitioner was properly convicted of the assimilated state offense.¹⁵

¹⁵ Because petitioner was properly tried and convicted pursuant to the Louisiana child murder statute and the ACA, her sentence of life imprisonment was consistent with—indeed, dictated by—applicable law. The Assimilative Crimes Act provides that a person who commits a state crime on a federal enclave "shall be guilty of a like offense and subject to a like punishment." 18 U.S.C. 13(a). In sentencing a defendant convicted of an assimilated state crime, a court generally applies the Sentencing Guidelines provisions applicable to the most closely analogous federal crime. State law, however, establishes both the minimum and maximum penalties to which the defendant may be exposed. See *United States v. Pierce*, 75 F.3d 171, 176 (4th Cir. 1996); *United States v. Garcia*, 893 F.2d 250, 254 (10th Cir. 1989), cert. denied, 494 U.S. 1070 (1990); *United States v. Leake*, 908 F.2d 550, 553 (9th Cir. 1990); *United States v. Marmolejo*, 915 F.2d 981, 984 (5th Cir. 1990). The Louisiana first degree murder statute provides for a manda-

II. IF THIS COURT HOLDS THAT THE ASSIMILATION OF LOUISIANA LAW WAS IMPROPER, THE CASE SHOULD BE REMANDED FOR RESENTENCING FOR THE FEDERAL OFFENSE OF SECOND DEGREE MURDER

If this Court holds that assimilation of the Louisiana child murder statute was improper, this case should be remanded for resentencing on the federal offense of second degree murder. Because the essential elements of federal second degree murder were proved at trial and found by the jury, the district court may properly enter a judgment of conviction under 18 U.S.C. 1111(a) if that statute is held to render the ACA inapplicable. The court of appeals erred, however, in holding that petitioner's sentence of life imprisonment could be affirmed on the ground that it fell within the statutory maximum sentence for second degree murder under federal law. Rather, petitioner should be resentenced under the Guidelines provisions applicable to second degree murder.

A. "Where the government wrongfully secures a conviction under a state statute pursuant to the Assimilative Crimes Act, rather than under the relevant federal statute, the appropriate remedy is not a reversal of the conviction, but rather a vacating of the sentence and a remand to the district court for resentencing" on the federal offense. *United States v. Word*, 519 F.2d 612, 618 (8th Cir.), cert. denied, 423 U.S. 934 (1975). Accord *United States v. Hall*, 979

tory life sentence if the government does not seek the death penalty. La. Rev. Stat. Ann. § 14:30C. The United States did not seek the death penalty in this case. The district court was therefore required to sentence petitioner to life imprisonment.

F.2d 320, 323 (3d Cir. 1992); *United States v. Lavelander*, 602 F.2d 639, 641 (4th Cir. 1979); *United States v. Walker*, 557 F.2d 741, 746 (10th Cir. 1977); *United States v. Chaussee*, 536 F.2d 637, 644-645 (7th Cir. 1976); *United States v. Olvera*, 488 F.2d 607, 608 (5th Cir. 1973), cert. denied, 416 U.S. 917 (1974); *Hockenberry v. United States*, 422 F.2d 171, 174 (9th Cir. 1970). So long as the essential elements of the preemptive federal crime have been proved at trial and found by the jury, the absence of specific submission to the jury of the federal offense does not preclude the district court from entering a judgment of conviction. Cf. *Rutledge v. United States*, 116 S. Ct. 1241, 1250 (1996) ("[F]ederal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense. * * * This Court has noted the use of such a practice with approval.").

The federal murder statute provides that "[m]urder is the unlawful killing of a human being with malice aforethought," and that any murder that does not constitute first degree murder "is murder in the second degree." 18 U.S.C. 1111(a). In this case, the court of appeals correctly held that the government had proved, and the jury had found in returning its verdict on the assimilated state charge, all of the elements of federal second degree murder. J.A. 77-80. The court noted in particular that Section 1111(a)'s requirement of "malice aforethought" could be established by proof that petitioner acted with specific intent to inflict serious bodily injury. J.A. 78 & n.11.

That construction of the federal murder statute is consistent with the historical understanding of "malice aforethought." "The common-law crime of murder

was the unlawful killing of a human being with 'malice aforethought' or 'malice prepense,' which consisted of an intention to kill or grievously injure, knowledge that an act or omission would probably cause death or grievous injury, an intention to commit a felony, or an intention to resist lawful arrest." *Schad v. Arizona*, 501 U.S. 624, 648 (1991) (Scalia, J., concurring in part and concurring in the judgment). Accord, e.g., O. Holmes, *The Common Law* 44 (Howe ed. 1963) ("malice aforethought" includes "[a]n intention to cause the death of, or grievous bodily harm to, any person") (quoting Stephen, *Digest of Criminal Law*); W. LaFave & A. Scott, *Criminal Law* 616 (2d ed. 1986) ("English judges came to hold that one who intended to do serious bodily injury short of death, but who actually succeeded in killing, was guilty of murder in spite of his lack of an intent to kill.").¹⁶ The federal murder statute should be construed in a manner consistent with that historical understanding. See, e.g., *United States v. Shabani*, 513 U.S. 10, 13 (1994) (noting "the settled principle of statutory construction that, absent contrary indications,

¹⁶ See also 2 Wharton's *Criminal Law* 246-247 (15th ed. 1994) ("malice aforethought" encompasses, *inter alia*, "intent to cause great bodily harm"); R. Perkins, *A Re-Examination of Malice Aforethought*, 43 Yale L. J. 537, 552-555 (1934) (discussing established common law rule that intent to inflict great bodily injury suffices to establish malice aforethought, even if intent to kill is absent); H. Wechsler and Michael, *A Rationale of the Law of Homicide: I*, 37 Colum. L. Rev. 701, 702-703 (1937) (noting established rule that homicide was murder if done with an intent to cause death or grievous bodily harm); cf. *Lara v. Parole Comm'n*, 990 F.2d 839, 841 (5th Cir. 1993) ("malice aforethought" under federal murder statute includes "1) intent to kill; 2) intent to do serious bodily injury; and 3) extreme recklessness and wanton disregard for human life.").

Congress intends to adopt the common law definition of statutory terms.").

In accordance with the language of the Louisiana child murder statute, the district court instructed the jury that it could find petitioner guilty only if it found that she had "killed Jadasha D. Lowery" and that she had "acted with specific intent to kill or inflict great bodily harm." J.A. 31. In finding petitioner guilty on the basis of that instruction, the jury necessarily found all of the elements of second degree murder under 18 U.S.C. 1111(a). If petitioner's conviction on the assimilated state charge is held to be improper, the appropriate remedy is a remand for entry of a judgment of conviction on the federal offense of second degree murder.¹⁷

B. The court of appeals also held that there was no need for resentencing on the federal offense of second

¹⁷ The indictment in this case charged that petitioner "did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery." J.A. 3. The indictment thereby alleged the essential elements of second degree murder under 18 U.S.C. 1111(a). The fact that the indictment relied (see J.A. 3-4; note 4, *supra*) on the ACA and Louisiana law, rather than on Section 1111(a), does not preclude entry of a judgment of conviction for federal second degree murder if the Court finds that disposition to be otherwise appropriate. "In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute." *United States v. Hutcheson*, 312 U.S. 219, 229 (1941). See Fed. R. Crim. P. 7(c)(3) ("Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.").

degree murder because petitioner's sentence of life imprisonment fell within the statutory maximum penalty for that offense. See J.A. 80. We do not agree. See Br. in Opp. 17-18 n.10. If the jury had found petitioner guilty of second degree murder under federal law, the district court would have been required to utilize the Sentencing Guidelines provisions applicable to that offense, and the court might have imposed a sentence below the statutory maximum.¹⁸ An upward departure from that range, if appropriate, could reach the statutory maximum of a life sentence, but it is for the district court in the first instance to make such a determination. *Koon v. United States*, 116 S. Ct. 2035, 2045 (1996) (departures are reviewable only for abuse of discretion); cf. *Williams v. United States*, 503 U.S. 193, 205 (1993) (Guidelines appeal provisions did not transfer initial sentencing responsibility to courts of appeals). Resentencing under the Guidelines is therefore appropriate if this Court vacates petitioner's conviction on the assimilated state offense and orders entry of a judgment of conviction for federal second degree murder.

¹⁸ Sentencing Guidelines § 2A1.2 establishes a base offense level of 33 for second degree murder. After adding two points for the vulnerable victim adjustment, Guidelines § 3A1.1, petitioner's offense level would be 35, and her sentencing range, as an offender in Criminal History Category I, would be 166-210 months' imprisonment.

CONCLUSION

The judgment of the court of appeals should be affirmed. In the alternative, the judgment of the court of appeals should be vacated and the case remanded to the district court for entry of a judgment of conviction for second degree murder under 18 U.S.C. 1111(a), and for resentencing on that offense.

Respectfully submitted.

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